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In The

Supreme Court of the United States

October Term, 1983

RICHARD J. MARINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI

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October, 1983

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(9973)

Petitioner, RICHARD J. MARINO, seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on August 29, 1983.

Questions Presented

1. Does petitioner's acquittal on a 1976 RICO indictment bar the Government, under the double jeopardy clause of the Fifth Amendment, from reprosecuting petitioner under a later RICO indictment for (1) a predicate act of racketeering of which the Government was aware and could have included in its earlier indictment and (2) petitioner's association with the same enterprise as litigated in the former trial during the years included in the first indictment?

2. Does the doctrine of collateral estoppel preclude the Government from relitigating, under the second RICO indictment, factual allegations which were necessarily resolved in petitioner's favor upon his acquittal under the first RICO indictment?

List of Parties

The parties to the proceeding in the court whose judgment is sought to be reviewed are the United States of America and Samuel J. Russotti, Rene Piccarreto, Richard J. Marino, Thomas E. Marotta, Joseph R. Rossi, Anthony M. Colombo, Donald J. Paone, Joseph J. Trieste, Joseph J. LaDolce and John M. Trivigno, the defendants below.

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In The

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October Term, 1983

RICHARD J. MARINO,

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vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion rendered by the District Court for the Western District of New York is reported at 555 F.Supp. 1236 (1983).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on August 29, 1983 and this petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under 28 USC § 1254(1).

Constitutional Provisions and Statutes

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Statutes under which Petitioner was prosecuted are 18 U.S.C. §§ 1961 and 1962. Their text is set forth in the appendix.

Statement of the Case

In 1976 petitioner Richard J. Marino, along with seven other individuals, was charged under 18 U.S.C. § 1962(c) and (d), with a substantive violation of the Racketeering Influenced and Corrupt Organizations Act (RICO) and a RICO conspiracy. The indictment alleged that petitioner was a member of a criminal enterprise which engaged in various crimes of arson and insurance fraud from on or about June 1, 1969 until August 31, 1973 (30).*

Trial on the 1976 indictment was had during September and October, 1977. As part of the prosecution's case, the Government offered the testimony of co-defendants Angelo Monachino and Joseph LaNovara who pled guilty before trial and testified as Government witnesses. Through the testimony of these men the Government attempted to establish petitioner's association with an enterprise which had as its purpose the commission of a variety of illegal acts in the Rochester area including the crimes of arson and insurance fraud, murder, extortion, loan sharking and the obstruction of justice (67-78). Petitioner Marino was acquitted on both counts of the 1976 indictment.

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*Numbers in parentheses refer to pages in the record.

Marino, as well as Rene Piccarreto, Samuel J. Russotti and Thomas E. Marotta was also charged, in 1976, with the murder of Vincent J. Massaro. The defendants were tried and convicted in state court. The conviction was vacated, however, when it was discovered that several police officers gave perjured trial testimony. There is no dispute that the federal authorities were aware of petitioner's alleged connection with the Massaro homicide; indeed, the federal and state authorities joined forces in investigating and prosecuting the state case, and currently, members of the county prosecutor's office are assigned to prosecute the pending federal indictment.

The RICO indictment under which petitioner is presently charged was filed in November, 1982. The first count of the indictment alleges that petitioner was associated with a criminal enterprise which engaged in a pattern of racketeering activity through the commission of acts of extortion, arson, murder and the obstruction of justice. The acts alleged are said to have occurred from on or about February 1, 1971 until the date of the filing of the indictment on November 8, 1982. The second count of the indictment charges that petitioner conspired to violate 18 U.S.C. § 1962(c) by participating in the affairs of the enterprise through that pattern of racketeering activity described in Count I of the indictment (13-30).

Petitioner's motion to dismiss the 1982 indictment as violative of his rights under the double jeopardy clause was denied by Order of the United States District Court for the Western District on January 26, 1983 (402). The Order of that Court was affirmed by the judgment of the United States Court of Appeals for the Second Circuit entered on August 29, 1983.

Reasons for Granting the Writ

I

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 18 U.S.C. §1961 *ET SEQ.* AND DECISIONS OF THIS COURT CONCERNING THE PROTECTIONS AFFORDED BY THE DOUBLE JEOPARDY CLAUSE.

The point at which double jeopardy attaches under a RICO prosecution has not been squarely addressed by this Court or by the majority of the Courts of Appeals. Further, the decision of the Second Circuit herein conflicts in principle with other Courts of Appeals decisions regarding RICO and the proper unit of prosecution for double jeopardy analysis, under 18 U.S.C. § 1961 *et seq.* It is, as well, at odds with this Court's decision in *Sanabria v. United States*, 437 U.S. 54 (1978).

Petitioner had argued that although the Government was not totally precluded from reprosecuting him under the 1982 RICO indictment, it was limited in the scope of the prosecution. Petitioner asserted that because he had been acquitted in 1976 of membership in the same enterprise to be tried under the 1982 indictment, the Government could not relitigate his association with that enterprise during the years covered under the indictment, 1971-1975, and by use of the same evidence previously litigated under the first RICO indictment. Petitioner further averred that the Government could not include as one of the predicate acts of racketeering under the 1982 indictment, the 1976 murder of Jimmy Massaro. Because the Government knew of petitioner's alleged involvement in that homicide when it filed its 1976 indictment and because that homicide could have been charged as a predicate act of racketeering in 1976, the double jeopardy clause forbids its inclusion in the pending indictment.

The Second Circuit held that the allowable unit of prosecution under RICO involved consideration of both elements of the statute: the enterprise element and the pattern of racketeering element. The Court thus concluded that a valid claim of double jeopardy would arise only if both the enterprise and the pattern of activity alleged in the 1976 indictment were the same as those alleged in the 1982 indictment. Because the Court found that the 1976 indictment charged an arson for hire pattern of racketeering by the enterprise, while the 1982 indictment charged an extortion pattern, even though by the same enterprise, no double jeopardy problem was implicated by the pending prosecution.

Resolution of the double jeopardy claim through examination of the claimed pattern of activity is unsatisfactory for several, interrelated reasons. First, the Courts of Appeals which have addressed the definition of a pattern of racketeering under RICO have invariably held that predicate acts of racketeering need not be interrelated in order to create a pattern since the enterprise element of the statute provided the underlying link among the various predicate acts. *See United States v. Barton*, 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981); *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

Because the Government need allege no more than two predicate acts to establish a pattern of racketeering and because those acts need not be related to each other, the Second Circuit's holding could obviate the possibility of any double jeopardy claim ever arising under RICO. The Government need only draft RICO indictments based upon two predicate acts concerning one enterprise, holding, in case of acquittal as happened here, other acts in reserve concerning the very same enterprise during the same time period. While the Second Circuit voiced its sensitivity to petitioner's concern in this regard, it found that

the problem had not arisen in this case because the indictments "allege distinct patterns of racketeering activity" (A-14).*

However, it is in this case, where the Second Circuit found "distinct patterns" that the danger of the Court's interpretation is underscored. Petitioner does not argue that the 1982 indictment cannot be prosecuted. Rather, he argues that because the Massaro murder could have been included in the 1976 indictment, double jeopardy forbids its prosecution at this point since it is an incident of the crime earlier charged. The Second Circuit disagreed since "the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme* — a scheme which had no relationship to the 1976 arson-for-hire activity" (A-15).

Petitioner respectfully submits that this conclusion belies the artificial construct created by the Second Circuit. The Massaro murder occurred on November 23, 1973 (18). The next alleged act in the purported extortion indictment allegedly occurred sometime in 1977. Thus, there is no inherent reason why the Massaro murder is any more related to the extortion pattern than the arson pattern. Indeed, the converse would be the more logical position given the gap between the time of the murder and the time of the acts alleged in the 1982 Indictment, as opposed to the time of the acts in the 1976 indictment. The only connection on the face of this record is that the respondent includes that act in the extortion indictment. Nonetheless, even if the respondent alleged it to be so, the Government need not prove, in order to try the case, any connection between the Massaro murder and the other predicate acts alleged *(United States v. Weisman, supra)*. There is, then, no protection against the risk of exponentially increasing indictments: the Government may carve up a single enterprise into multiple RICO

*Numbers in parentheses preceded by "A" refer to pages of the Appendix hereto.

indictments simply by picking and choosing separate acts of racketeering in support thereof even where, as here, they are based on the same time period and cadre of witnesses.

The probability of increased prosecutions under a similar theory was condemned in *Sanabria v. United States*, 437 U.S. 54 (1978). In *Sanabria*, the defendant was charged with violating 18 U.S.C. § 1955 forbidding association with an illegal gambling business. At the close of trial a judgment of acquittal was entered on the basis of insufficient proof that the defendant had been involved in horse betting. The Government sought to reprosecute defendant on that portion of the indictment related to numbers betting, arguing that the numbers and horse wagering constituted discrete bases of liability even though conducted by the same gambling enterprise over the same time span.

This Court rejected the argument holding that Sanabria could not be prosecuted for involvement in the same gambling business by a different means of commission. This Court noted:

> "If we were to accept the Government's theory, each of these [the specific means of participation in the gambling business] could be varied one at a time, to charge a separate count on which a defendant could be reprosecuted following acquittals on any of the others" (*Sanabria, Id.* at 73, fn. 32).

In *Sanabria*, the Court analogized to *Braverman v. United States*, 317 U.S. 49 (1942) and held that just as the essence of the conspiracy is the *agreement* to commit an illegal act, the essence of 18 U.S.C. § 1955 was participation in a gambling *business*, not the means of that participation.

Because, as respondents herein concede, the RICO statute is in *pari materi* with 18 U.S.C. § 1955, which in turn was equated in its essence with the crime of conspiracy, analogy to criminal conspiracy law is apt. The gist of a conspiracy is the agreement itself which "embraces and defines its objects"

(*Braverman v. United States*, *Id.* at 53). Similarly, under RICO, rather than attempt a virtually meaningless analysis of the pattern of racketeering activity, a double jeopardy inquiry should focus on the enterprise which is that element under RICO providing the unifying link between disparate predicate acts (*United States v. Weisman*, *supra*). Scrutiny of the enterprise element of the statute is all the more germane in a case where, as here, the business of the enterprise is alleged to be entirely illegal. In that case, emphasis on the pattern acts of racketeering will swallow the concept of the enterprise itself. As this Court explained in *United States v. Turkette*, 452 U.S. 576 (1981), the enterprise and pattern acts are different elements of the crime each of which must be proven separately. This distinction is obviated, however, when an allegedly illegal enterprise is defined only through its pattern acts.

Thus, just as a conspiracy is understood by reference to the agreement which defines its objects, a RICO violation is best comprehended by reference to the enterprise which defines the requisite *pattern* of racketeering especially where the enterprise is claimed to be an illegal one. Otherwise, the distinction which this Court has determined must exist between the pattern acts and the enterprise would vanish since to embrace the decision below would permit the entire activity and composition of the enterprise to consist of nothing more than the commission of the requisite pattern acts.

While the Second Circuit did not deny the significance of conspiracy law precedent, it held that petitioner's analogy failed because in this case there were two distinct criminal endeavors equivalent to two distinct conspiracies. Petitioner, however, contends that both the 1976 and 1982 indictments charge but one crime, or to use the conspiracy analogy, one single conspiracy, having as its object the commission of various predicate illegal acts, one of which was the Massaro murder, which is equally related to each set of pattern acts, those of the 1976 indictment and those of the 1982 indictment.

The Second Circuit had previously recognized that in a conspiracy prosecution the Government can readily avoid the strictures of the double jeopardy clause by enumerating diverse overt acts in each indictment, thereby meeting the same evidence test of *Blockburger v. United States*, 284 U.S. 299 (1932). Therefore, in *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), the Court concluded that it would determine whether there was one conspiracy or two by utilizing similar factors adopted by the Second Circuit in analyzing this case. *Mallah* did not deny the reality of two different conspiracies but stated, quoting *Short v. United States*, 91 F.2d 614, 624 (4th Cir. 1937):

> ". . . if the government sees fit to send an indictment in this general form charging a continuing conspiracy for a period of time, it must do so with the understanding that upon conviction or acquittal further prosecution of that conspiracy *during the period charged is barred* . . . if in fact the second indictment involves substantially the same conspiracy as the first . . ." (*Mallah*, *Id.* at 985, emphasis supplied).

In *Mallah*, while the Court examined the nature and scope of each conspiracy alleged, it held that the fact of different overt acts in each indictment was not instructive as to the scope of the crime. Similarly, in a RICO case, while it may be appropriate to consider the time frame, actors, location and other indicia of two alleged RICO offenses, it is inaccurate to rely upon the nature of the predicate acts to determine whether there is one RICO crime or two.

Adoption of the analysis in *Mallah* to this case does not impose the prosecutorial straitjacket which the respondent and the Second Circuit fear. Petitioner is not attempting to foreclose the Government from trying any violation of the statute which had not even occurred upon filing of the first indictment and which might therefore constitute a new crime under the same statute. The Government should not, however, be allowed to try

petitioner piecemeal on acts of racketeering which are incidents of one crime and which occurred during the same time period of the commission of that crime. This Court stated in *Brown v. Ohio*, 431 U.S. 161 (1977): "'Where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of these incidents without being twice put in jeopardy for the same offense'" (*Brown, Id.* at 168, quoting *In Re Nielsen*, 131 U.S. at 176, 188 (1889)).

Nor should the Government be allowed to relitigate an element of the crime of which the petitioner has already been acquitted: membership in the same enterprise at issue in the present indictment for the years 1971-1975. That acquittal bars any further prosecution for association with the same enterprise during the same time period under the presently pending indictment (*Sanabria, Id.* at 171-172).

With the enactment of the RICO legislation, the Government has been handed a new weapon in its arsenal against organized crime. Indeed, the very broad reach of RICO poses the potential for undue prosecutorial zeal. (*United States v. Huber*, 603 F.2d 387 [2d Cir. 1979], *cert. denied*, 445 U.S. 927 [1980].) Given the expanded scope of allowable prosecutions under RICO, petitioner respectfully submits that the intersection of the double jeopardy clause and RICO is a matter of significance to this Court particularly where the business of the enterprise is said to be illegal. Instruction by the Court is necessary to resolve the problems herein in an effort to avoid future RICO prosecutions which are drafted to escape the strictures of the double jeopardy clause and, at the same time, to instruct both the Court and criminal defendants of the point at which jeopardy attaches under RICO. This Court should answer the question of whether the Government shall be permitted to repeatedly reprosecute the same enterprise for each two pattern acts which are related only through the enterprise, regardless of whether the defendant was previously found not guilty of being a member of the enterprise during a time period covered by the subsequent prosecution.

II

THE COURT ERRED IN ITS RESOLUTION OF PETITIONER'S COLLATERAL ESTOPPEL CLAIM.

Petitioner had argued to the Second Circuit that the doctrine of collateral estoppel, above and beyond the question of the allowable unit of prosecution, foreçloses the Government from relitigating petitioner's membership in the enterprise alleged during the years 1971-1975. Marino contends that since he had been acquitted of *conspiring* to and in fact conducting the affairs of an enterprise through a pattern of racketeering activity, the jury must necessarily have determined that petitioner was not a member of the enterprise charged. The Second Circuit rejected the argument stating:

> "As for the acquittal on the RICO conspiracy count, even assuming that the jury concluded that they were not members of the enterprise, this does not preclude a subsequent conspiracy conviction, provided the two conspiracies are distinct criminal schemes" (A-17).

Petitioner is not, however asserting that collateral estoppel precludes a subsequent prosecution, whether of a substantive or conspiracy violation. Rather, because the first trial resolved several facts in petitioner's favor, those facts cannot be relitigated even to prove a new offense. Under the 1976 indictment, Government witnesses Monachino and LaNovara testified that petitioner was present at meetings and initiation rights of the association which comprised the enterprise (255, 290). The record shows that respondent does not deny that it intends to offer these same witnesses to prove petitioner's association with the same enterprise during the years 1971-1975 when Monachino and LaNovara were admitted participants in the criminal organization. Because the jury necessarily resolved, through its verdict of acquittal on the conspiracy count, the issue of petitioner's membership during 1971-1975 in their favor, the facts which were offered in support of that issue

cannot again be litigated, regardless of the reason for which they are used.

The doctrine of collateral estoppel precludes the Government from relitigating evidentiary as well as ultimate facts. *Wingate v. Wainwright*, 464 F.2d 209 (5th Cir. 1972). Thus, whether or not the 1982 indictment charges entirely new crimes, petitioner cannot be made, during the course of that prosecution, to defend against *charges or factual allegations* that he overcame in the earlier trial, as if that trial had never taken place. (*Wingate, Id.* at 214).

CONCLUSION

For these reasons, the writ of certiorari should be granted.

Respectfully submitted,

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October, 1983

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1367, 1368, 1369, 1370—August Term, 1982

Argued: July 11, 1983 Decided: August 29, 1983

Docket Nos. 83-1054, 83-1055, 83-1056, 83-1069

UNITED STATES OF AMERICA,

Appellee,

—v.—

SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO, and THOMAS E. MAROTTA,

Defendants-Appellants.

Before:

NEWMAN and WINTER, *Circuit Judges*, and MALETZ, *Senior Judge.**

* Of the United States Court of International Trade, sitting by designation.

Appeal from an order of the United States District Court for the Western District of New York, Michael A. Telesca, J., 555 F. Supp. 1236, denying motions to dismiss an indictment.

Affirmed.

JOHN F. HUMANN, Buffalo, N.Y. (Richard Miller, Rochester, N.Y., on the brief), *for defendants-appellants Russotti and Marotta.*

HAROLD J. BOREANAZ, Buffalo, N.Y., *for defendant-appellant Piccarreto.*

PAUL J. CAMBRIA, JR., Buffalo, N.Y. (Mary Good and Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., on the brief), *for defendant-appellant Marino.*

KENNETH R. FISHER, Sp. Asst. U.S. Atty., Rochester, N.Y. (Salvatore R. Martoche, U.S. Atty., and Robert L. King, Sp. Asst. U.S. Atty., Rochester, N.Y., on the brief), *for appellee.*

MALETZ, *Senior Judge*:

Defendants-appellants Samuel J. Russotti, Rene Piccarreto, Richard J. Marino and Thomas E. Marotta appeal from an order of the United States District Court

for the Western District of New York, Michael A. Telesca, J., denying their motions to dismiss an indictment filed November 9, 1982. That indictment charges appellants and six others with violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970), commonly known as RICO. *See United States* v. *Russotti*, 555 F. Supp. 1236 (W.D.N.Y. 1983). The grounds for their appeal are essentially threefold. First, appellants Marino and Piccarreto argue that in view of a 1976 RICO prosecution of them the present RICO indictment should be dismissed as violative of the double jeopardy clause. Second, in 1978 a New York State court judgment convicting all four appellants of the 1973 murder of a Vincent J. Massaro was vacated. The inclusion of that homicide as an underlying RICO predicate offense should be barred, appellants contend, because of an alleged joint federal-state effort to procure that conviction. Third, appellants submit alternatively, that since the government knew of the 1973 Massaro homicide prior to the 1976 RICO indictment, the failure to include that offense as a predicate act in that indictment barred the inclusion of the Massaro homicide as a predicate act in the 1982 RICO indictment.

For the reasons appearing below, we find appellants' contentions without merit and, accordingly, affirm the order of the district court.

I

Background

In 1976 the government filed a two-count indictment charging defendants Piccarreto, Marino and six others with a RICO substantive violation, as well as RICO conspiracy, 18 U.S.C. § 1962(c) and (d) (1970).[1] The 1976

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[1] The relevant portions of RICO provide:

§ 1961. *Definitions*

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under . . . the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), . . . section 1503 (relating to obstruction of justice), . . . section 1951 (relating to . . . extortion) . . .;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, or any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

. . . .

§ 1962. *Prohibited activities*

. . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such en-

indictment alleged that from June 1, 1969 to August 31, 1973, Piccarreto and Marino were members of a criminal enterprise which conspired to commit and did commit multiple acts of arson. They were further charged with having devised a scheme to defraud insurance companies by means of false representations as to the facts and circumstances surrounding the fires. The life of the enterprise allegedly ran from June 1, 1969 to August 31, 1973. The first predicate offense was alleged to have occured on January 26, 1970, and the last on March 17, 1973. On October 7, 1977, a jury returned a verdict of not guilty as to both Piccarreto and Marino.

Also during 1976 all four appellants were convicted in a New York state court of conspiracy in the first degree and murder in the second degree in connection with the homicide of Vincent J. Massaro. However, in 1978 the judgment of conviction was vacated and the indictment dismissed when it was discovered that their convictions had been obtained through the use of perjured testimony of sheriff's deputies. The United States brought civil rights prosecutions against the responsible sheriff's deputies and state prosecutors and secured convictions. It is undisputed that the federal authorities were aware of appellants' alleged involvement in the Massaro homicide at the time the 1976 RICO indictment was filed.

On November 8, 1982 the present RICO indictment was filed against all four appellants and six others charging them with a substantive violation of RICO, 18 U.S.C. § 1962(c), and a conspiracy to violate RICO, 18 U.S.C. § 1962(d). The indictment charges that defendants con-

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terprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection[ ] . . . (c) of this section.

spired to and conducted the affairs of an enterprise through a pattern of racketeering activity which included murder, attempted murder, arson, extortion and obstruction of justice. The pattern of racketeering activity is alleged to have occured from October of 1973 (acts preparatory to the Massaro homicide) to December 17, 1981 (the date of an alleged extortionate act). The life of the enterprise is purported to have run from February 1, 1971 up to the date of the indictment.

With this background we consider at the outset appellants' contention that the dual sovereignty rule is inapplicable to the extent that the 1982 indictment charges appellants with a pattern of racketeering activity which includes as a predicate offense the murder of Vincent Massaro.

II

Dual Sovereignty

Appellants argue that the federal government was so deeply involved in the state murder prosecution as to preclude application of the dual sovereignty rule, at least insofar as the 1982 indictment alleges the Massaro murder as a predicate act of racketeering and an overt act of conspiracy to violate RICO. At a minimum, appellants submit, they are entitled to an evidentiary hearing on this point.

The concept of dual sovereignty is firmly established, and appellants do not take specific issue with it. In addressing the question whether double jeopardy bars a federal prosecution of a defendant already prosecuted for the same act by a state, the Supreme Court answered in the negative in *United States* v. *Lanza*, 260 U.S. 377 (1922):

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.

Id. at 382. *Accord United States* v. *Wheeler*, 435 U.S. 313, 320 (1978); *Abbate* v. *United States*, 359 U.S. 187, 194 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121, 129 (1959).

However, the doctrine is not unqualified. "The dual sovereignty doctrine is subject to the qualification . . . that a state prosecution cannot be used merely as a cover and a tool of federal authorities." *United States* v. *Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). On this score, appellants argue, the dual sovereignty rule fails here. They contend that the state murder prosecution was merely a cover for the federal authorities who were so substantially involved in the state prosecution that they should not be allowed to relitigate the same issues.

The record shows, though, that in the Massaro prosecution the state and federal authorities were acting independently of one another. The federal authorities ultimately withdrew from the case and the state continued alone. It is true that before this there was a cooperative effort between the state and federal authorities which, appellants insist, completely eroded dual sovereignty. To this contention the district court replied:

> [T]hat factor was present—to some extent—in both *Bartkus* and in *Aleman*, and in both cases the respective courts praised the "cooperation between state and federal authorities [as] a welcome innovation." *United States* v. *Aleman*, at 309; *Bartkus* v. *Illinois*, 359 U.S. at 123, 79 S.Ct. at 678. . . . The cooperation between state and federal police agencies and prosecutorial organizations is both laudatory and desired.

555 F. Supp. at 1239. We agree with the district court and conclude that the dual sovereignty rule is fully applicable here.

Appellants present an associated due process argument that they were improperly denied a hearing on the dual sovereignty question. We find this equally unavailing. First, appellants offered little in the way of proof of federal orchestration of the state murder trial other than the barest conclusory allegations. While two witnesses in the state murder trial were admitted to the federal witness protection program, that fact alone does not transform the Massaro trial into a federal prosecution for jeopardy purposes, there being not the slighest indication that the federal authorities manipulated the state process to accomplish that which they could not constitutionally do themselves. *See United States* v. *Ng*, 699 F.2d 63, 68 (2d Cir. 1983); *United States* v. *Liddy*, 542 F.2d 76, 79-80 (D.C. Cir. 1976). What is more, the uncontradicted affidavit of Special Assistant United States Attorney Robert L. King describing in detail the limited federal involvement in the Massaro murder trial obviated whatever necessity there may have been for conducting a hearing. In sum, the decision of the district court to deny appellants' motion without a hearing was well within its discre-

tion. *See United States* v. *Cohen*, 489 F.2d 945, 951-52 (2d Cir. 1973).

Finally, given our conclusion that there is no reason for ignoring the dual sovereignty rule here, appellants' subsidiary claim of prosecutorial vindictiveness must perforce be rejected. *United States* v. *Ng*, 699 F.2d at 68 ("A setting that involves the conduct of two independent sovereigns does not lend itself to the concept of vindictive prosecution").[2]

We next address the question of the preclusive effect, if any, of the 1976 RICO prosecution on the 1982 RICO indictment in issue here.

III

Former Jeopardy

Appellants Marino and Piccarreto launch somewhat divergent attacks against the 1982 indictment based on the 1976 RICO prosecution, but at bottom all contentions are grounded on claims of double jeopardy or collateral estoppel.[3] Our review is, of course, narrowly circumscribed, given the pretrial status of this appeal. *See Abney* v. *United States*, 431 U.S. 651, 656-62 (1977). The critical double jeopardy inquiry is whether the 1982 indictment

2 Although it is not entirely clear that this latter claim is properly before the court on the interlocutory appeal, *see United States* v. *Hollywood Motor Car Co.*, ___ U.S. ___, 102 S. Ct. 3081 (1982); *Abney* v. *United States*, 431 U.S. 651, 662-63 (1977), we nevertheless conclude that to the extent that that claim relates to the double jeopardy question it is reviewable by us at this time. *See United States* v. *Wright*, 622 F.2d 792, 793 (5th Cir.), *cert. denied*, 449 U.S. 961 (1980).

3 Inasmuch as appellants Russotti and Marotta were not named in the 1976 indictment, they do not claim former jeopardy based on the 1976 RICO prosecution. We consider appellants' collateral estoppel argument in Part IV, *infra*.

would, in effect, seek to punish Marino and Picarreto for any of the same offenses for which they were tried and acquitted in the 1976 RICO prosecution. *See United States* v. *Solano*, 605 F.2d 1141, 1144 (9th Cir. 1979), *cert. denied sub nom. England* v. *United States*, 444 U.S. 1020 (1980). The answer to this inquiry necessarily depends on what Congress prescribed as the "allowable unit of prosecution." *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1977). "[T]hat prescription determines the scope of protection afforded by a prior conviction or acquittal." *Id.* at 70.

Not surprisingly, appellants and the government take diametrically opposing positions on this issue. Appellants argue that the enterprise is the focal point of RICO, so that acquittal forecloses reprosecution for participation in the same enterprise, even though through a different pattern of racketeering activity. In reaching this conclusion analogize RICO to the crime of conspiracy, with the RICO enterprise being similar to the agreement to engage in criminal conduct, and the pattern of racketeering activity being akin to overt acts. From this, appellants argue, successive conspiracy prosecutions based solely on a different set of overt acts is barred and so too should successive RICO prosecutions where the enterprise is the same.

The government, for its part, counters that it is meaningless to focus exclusively on the enterprise without reference to what it does, citing *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983) ("it is logical to characterize any associative group in terms of what if *does*, rather than by abstract analysis of its structure" [emphasis in original]); and *United States* v. *Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977) ("legislative intent was to make RICO violations dependent upon behavior, not status"). Ac-

cordingly, the government labels the 1976 enterprise as the "arson-for-hire" enterprise, and the 1982 enterprise as the "extortion" enterprise, thereby purportedly distinguishing the two for double jeopardy purposes. Through this conduct-oriented characterization, the government argues, the allowable unit of prosecution is properly established.

In answering the question what is the "allowable unit of prosecution" under RICO, the Supreme Court's opinion in *United States* v. *Turkette*, 452 U.S. 576 (1981), is of particular guidance:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. . . . The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Id. at 583 (footnote omitted). Thus, it is neither the enterprise standing alone nor the pattern of racketeering activity by itself which RICO criminalizes. Rather, the *combination* of these two elements is the object of punishment under RICO. *See United States* v. *Mazzei*, 700 F.2d 85, 88-90 (2d Cir. 1983); *United States* v. *Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied sub nom. Meinster* v. *United States*, 102 S. Ct. 2965 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.) (pattern of racketeering activity must be done "in the conduct of the affairs of an 'enterprise' "), *cert. denied*, 449 U.S. 871 (1980). Therefore, in order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment. If either is different, there is no infirmity under the double jeopardy clause. *See generally* Note, *RICO and the Liberal Construction Clause*, 66 Cornell L. Rev. 167 (1980).

Instructive in this connection is *United States* v. *Dean*, 647 F.2d 779 (8th Cir.), *modified on other grounds*, 667 F.2d 729 (1981), *cert. denied*, 102 S. Ct. 2296 (1982), where the Eighth Circuit adopted a five factor test for determining whether two RICO counts charge two distinct patterns of racketeering activity. Those factors are

> (1) the time of the various activities charged as parts of separate patterns; (2) the identity of the persons involved in the activities under each charge; (3) the statutory offenses charged as racketeering activities in each charge; (4) the nature and scope of the activity the government seeks to punish under each charge; and (5) the places where the corrupt activity took place under each charge.

Id. at 788. Applying these five factors to the present case, first, there is an overlap of approximately two and one-half years in the duration of the two enterprises, from February 1, 1971, the beginning of the "extortion" enterprise, and August 31, 19793, the end of the "arson-for-hire" enterprise. However, there is no time overlap as to the predicate offenses alleged in the indictments, the last predicate offense alleged in the 1976 indictment having occurred on March 17, 1973, and the first predicate offense alleged in the 1982 indictment—the Massaro homicide—having occurred in October of 1973.

Second, as to the identity of persons involved in the alleged activities, of the eighteen persons indicted in 1976 and 1982 only two individuals are named in both indictments, Piccarreto and Marino.

Third, the racketeering activities charged in each indictment have only one point of conjunction, that being the allegation of arson. However, the act of arson charged in the 1982 indictment post-dates the last act of arson in the 1976 indictment by some five years. Moreover, the arson charged in the 1982 indictment is allegedly in furtherance of an extortion scheme, not the arson-for-hire scheme which was the focus of the 1976 indictment. In our view, there is no overlap of racketeering activities under the third *Dean* factor.

As to the fourth and most significant factor—the nature and scope of the activity the government seeks to punish under each indictment—as previously indicated the 1976 indictment concerned a scheme to defraud insurance companies by deliberately setting fires to insured buildings. The present indictment, by contrast, is directed at a scheme to extort monies from Rochester, New York gambling clubs, to protect the affairs of the enterprise from "rival and competing individuals" through the use

of threats, murder and arson, and to avoid detection by commiting other illegal acts, including murder and obstruction of justice. There is plainly no convergence of the two indictments in this regard.

Fifth, and finally, the place where the illegal activity took place in both indictments did center around the Rochester, New York area.

Having considered and applied the five *Dean* factors, the unavoidable conclusion is that the two indictments allege distinct patterns of racketeering activity. Even assuming an identity of the enterprises, in view of our conclusion that there are two distinct patterns of racketeering present here, the prosecution of Piccarreto and Marino does not offend the double jeopardy clause. Taken to its logical extreme, appellants' argument that the allowable unit of prosecution under RICO is the enterprise would effectively immunize members of that enterprise from any future prosecution following an initial RICO prosecution, regardless of the nature of the subsequent misconduct.

Withal, we are not insensitive to appellants' concern that the government may be free to pursue successive prosecutions under RICO by merely alleging two predicate acts—sufficient to establish a pattern of racketeering activity under 18 U.S.C. § 1916(5)—and, by holding in reserve other predicate acts, bring future RICO prosecutions against participants in the same enterprise.[4] Indeed,

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[4] In *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), court noted that "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." *Id.* at 395-96. This court went on to caution strongly against "undue prosecutorial zeal in invoking RICO," *id.* at 396. *See also United States* v. *Weisman*, 624 F.2d at 1123. *See generally* Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 Calif. L. Rev. 724 (1982).

appellants contend, an example of just that is presented here with the government's inclusion of the Massaro homicide as a predicate act in the 1982 indictment when the government in fact knew or should have known of that homicide at the time it filed its 1976 indictment. Thus, appellants submit, the Massaro homicide should have been included in the 1976 RICO indictment or not at all. However, the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme*—a scheme which had no relationship to the 1976 arson-for-hire activity.

In short, we are satisfied that the RICO indictment in the present case passes muster under the five *Dean* factors.

Appellants' further argument that RICO is analogous to the crime of conspiracy must fail, for here there exist two distinct criminal endeavors, one whose purpose was to obtain monies through arson for hire and insurance fraud, the other to obtain monies through extortion. Thus, the same group which during the same period of time organizes into different enterprises in order to consummate distinct patterns of racketeering activity may be prosecuted for each without trenching upon the constitutional guarantee against double jeopardy. *See United States* v. *Bagaric*, 706 F.2d at 55 ("the nature of the misconduct often provides the best clue toward defining the enterprise"); *United States* v. *Weisman*, 624 F.2d at 1123. *See also United States* v. *McDonald*, 692 F.2d 376 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 1531 (1983); *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). *Cf. Braverman* v. *United States*, 317 U.S. 49 (1942).

IV

Collateral Estoppel

We consider finally the contention that in light of the 1976 RICO acquittal the government is collaterally estopped from relitigating those issues which were resolved in favor of Marino and Piccarreto

The starting point for determining this collateral estoppel issue is *Ashe* v. *Swenson*, 397 U.S. 436 (1970). In *Ashe* the Supreme Court held that the doctrine of collateral estoppel, as applied to criminal proceedings precludes the government from relitigating an issue of ultimate fact involving the same parties that was *necessarily* determined in favor of a defendant. *Id.* at 444. The burden is on defendants to show that the verdict in the 1976 RICO prosecution decided the very issue now in litigation. *United States* v. *Mespoulede*, 597 F.2d 329, 333 (2d Cir. 1979); *United States* v. *Cala*, 521 F.2d 605, 608 (2d Cir. 1975); *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). Our task is to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444.

Here, Marino and Piccarreto contend that their 1977 acquittal on RICO charges necessarily means that the jury concluded that they were not members of the enterprise. However, as the government submits and as a fair reading of the 1982 indictment indicates, that indictment charges defendants with membership in an enterprise wholly different from that described in the 1976 indictment. Further, without engaging in a hypertechnical construction of the jury's verdict, *United States* v. *Mespoulede*,

597 F.2d at 333, there exists a "plausible explanation[ ] for the jury's failure to convict," *United States* v. *King*, 563 F.2d 559, 561 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978), even assuming that the enterprise in each indictment is the same. The acquittal of Marino and Piccarreto could have been the result of a jury determination that while they were members of the enterprise, they did not participate in the arson-for-hire or insurance fraud schemes. As for their acquittal on the RICO conspiracy count, even assuming that the jury concluded that they were not members of the enterprise, this does not preclude a subsequent conspiracy conviction, provided the two conspiracies are distinct criminal schemes. *United States* v. *Sturman*, 679 F.2d 840, 844 & n.9 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 816 (1983); *United States* v. *Papa*, 533 F.2d 815, 822 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976). Here, there is "nothing to suggest that the success of one [conspiracy to commit one particular scheme] was in any way dependent upon or related to the other" conspiracy. *Papa*, 533 F.2d at 822.

In brief, at this stage of the proceedings, we fail to see any indication of an attempt by the government "to persuade a second jury of the same fact already litigated" in defendants' favor. *Mespoulede*, 597 F.2d at 335. On this record, the government is thus not barred from charging Marino and Piccarreto with either a new RICO conspiracy or a new substantive RICO offense.

V

For the foregoing reasons, the order of the district court denying appellants' motions to dismiss the indictment is affirmed.

E R R A T A

Page	Line	DELETE	INSERT
6109	3	November 9, 1982	November 8, 1982

UNITED STATES of America,

Plaintiff,

v.

Samuel J. RUSSOTTI, et al., Rene Picarreto, Richard J. Marino, Thomas E. Marotta, Joseph R. Rossi, a/k/a "The Hop", Anthony M. Columbo, Donald J. Paone, Joseph J. Trieste, Joseph J. LaDolce, a/k/a Joseph J. LoDolce, John M. Trivigno, a/k/a "Flap", Defendants.

No. CR-82-156T.

United States District Court
W.D. New York.

Jan. 26, 1983.

Defendants brought series of motions, seeking to dismiss indictment under Racketeer Influenced and Corrupt Organizations Act or, in the alternative, to limit the proof that the Government could present at trial. The District Court, Telesca, J., held that: (1) Government could, for double jeopardy purposes, constitutionally include homicide which was subject of defendants' state court prosecution as underlying crime in RICO indictment based on principle of dual sovereignty; (2) even assuming that enterprises alleged in two RICO indictments which respectively charged "arson for hire" and murder, attempted murder, extortion and obstruction of justice were the same, prosecution of defendants under indictment charging murder and attempted murder following acquittal on other indictment did not violate double jeopardy clause; (3) Government was not collaterally estopped from relitigating issue of defendants' membership in criminal enterprise charged in former indictment by defendants' acquittal of charges thereunder; and (4) defendants' conclusory allegation of prosecutorial misconduct did not satisfy burden of demonstrating prosecutorial vindictiveness sufficient to require dismissal of indictment.

Motions denied.

1. Criminal Law Key No. 201

Government could, for double jeopardy purposes, constitutionally include homicide which was subject of defendants' state court prosecution as underlying crime in federal racketeering indictment based on principle of dual sovereignty, notwithstanding that two principal witnesses in state prosecution were under federal witness protection program. 18 U.S.C.A. § 1961 et seq.; U.S.C.A. Const.Amend. 5.

2. Commerce Key No. 82.5

Racketeer Influenced and Corrupt Organizations Act does not seek to criminalize membership alone in enterprise, nor does it criminalize racketeering activity standing alone, but, rather, it is combination of such two separate and distinct elements which Congress intended to punish by enacting statute. 18 U.S.C.A. § 1961 et seq.

3. Criminal Law Key No. 195(1)

In order for indictment under Racketeer Influenced and Corrupt Organizations Act to have offended double jeopardy clause on ground of prior RICO prosecution of defendants, criminal enterprise and pattern of racketeering alleged in prior indictment had to be "the same" as criminal enterprise and pattern of racketeering in subject indictment. 18 U.S.C.A. § 1961 et seq; U.S.C.A. Const.Amend. 5.

4. Criminal Law Key No. 196

Factors to be utilized in determining whether prior and subsequent Racketeer Influenced and Corrupt Organizations Act counts present distinguishable instances of conduct or participation in affairs of enterprise so as to avoid violation of double jeopardy clause are time of various activities charged as part of separate patterns, identity of persons involved in ac-

tivities, statutory offenses charged as racketeering activities in each charge, nature and scope of activity which Government seeks to punish under each charge, and places where corrupt activity took place under each charge. 18 U.S.CA. § 1961 et seq.; U.S.C.A. Const.Amend. 5.

5. Criminal Law Key No. 196

Even assuming that enterprises alleged in two Racketeering Influenced and Corrupt Organizations Act indictments respectively charging "arson for hire" and murder, attempted murder, extortion and obstruction of justice were the same, prosecution of defendants under indictment charging murder and attempted murder following acquittal on other indictment did not violate double jeopardy clause where there was no overlap as to predicate offenses alleged, only two defendants overlapped, only overlap of offenses was that both indictments alleged arson as predicate offense, nature and scope of activities sought to be proven under respective indictments clearly differed, and location of predicate acts of racketeering were wholly different. 18 U.S.CA. § 1961 et seq.; U.S.C.A. Const.Amend. 5.

6. Judgment Key No. 751

Issue of whether defendants were members of criminal enterprise as charged in prior Racketeer Influenced and Corrupt Organizations Act indictment was necessarily determined in their favor as result of acquittal of RICO charges and therefore collateral estoppel did not preclude Government from relitigating issue in subsequent RICO prosecution where defendants' acquittals could rationally be based upon jury's determination that, while they were both members of enterprise, they did not participate in particular affairs of enterprise charged and thus other plausible explanations existed for acquittal. 18 U.S.C.A. § 1961 et seq.; U.S.C.A. Const.Amend. 5.

7. Indictment and Information Key No. 144.2

Defendants have burden of demonstrating prosecutorial vindictiveness sufficient to require dismissal of indictment.

8. Indictment and Information Key No. 1442

Defendants' conclusory allegation of prosecutorial misconduct did not satisfy burden of demonstrating vindictiveness sufficient to require dismissal of indictment.

Salvatore R. Martoche, U.S. Atty. W.D.N.Y. by Kenneth R. Fisher and Robert L. King, Sp. Asst. U.S. Attys., Dept. of Justice Strike Force, Rochester, N.Y., for plaintiff.

John Humann, Buffalo, N.Y., for Piccarreto.

Paul J. Cambria, Jr., Buffalo, N.Y., for Marino.

Richard A. Miller, Rochester, N.Y., for Marotta.

Herbert Greenman, Buffalo, N.Y., for Rossi.

Robert Murphy, Buffalo, N.Y., for Colombo.

John F. Speranza, Rochester, N.Y., for Paone.

Charles Noce, Rochester, N.Y., for Trieste.

Robert Freedman, Buffalo, N.Y., for LaDolce.

John R. Parrinello, Rochester, N.Y., for Trivigno.

DECISION and ORDER

TELESCA, District Judge.

Presented for determination are a series of motions, joined in by all defendants, seeking to dismiss the indictment or, in the alternative, to limit the proof that the government may present at trial. The essence of all motions is rooted in the concepts of double jeopardy and collateral estoppel.

PRIOR STATE COURT PROCEEDINGS

The defendants Russotti, Piccarreto, Marotta and Marino were convicted in 1976, in Monroe Conty Court of conspiracy in the first degree in connection with the killing of Vincent J. Massaro. Subsequently, in 1978, that judgment of conviction was vacated and the indictment was dismissed based on the fact that their convictions were obtained through the use of perjured testimony. All defendants now contend that the present inclusion of the Massaro homicide as an underlying crime making up part of the racketeering pattern is barred by virtue of the prior state court proceedings.

At the outset, I note that defendants Rossi, Colombo, Paone, Trieste, LaDolce and Trivigno were never charged in any forum with this crime, hence their motions to dismiss on double jeopardy grounds are denied.

[1] The general question of whether successive federal and state prosecutions are constitutionally permissible has been raised many times. As the Supreme Court of the United States has stated, "[w]hile *United States v. Lanza*, 260 U.S. 377 [43 S.Ct. 141, 67 L.Ed 314], was the first case in which we squarely held valid a federal prosecution arising out of the same facts which has been the basis of a state conviction, the validity of such a prosecution by the Federal Government has not been questioned by this Court since the opinion of *Fox v. Ohio*, 5 How. 410 [46 U.S. 410, 12 L.Ed. 213], more than one hundred years ago." *Bartkus v. Illinois*, 359 U.S. 121, 129, 79 S.Ct. 676, 681, 3 L.ED.2d 684 (1959). In *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959), the Supreme Court directly addressed the question of "whether a federal prosecution of defendants already prosecuted for the same acts by a State, subjects those defendants 'for the same offense to be twice put in jeopardy of life or limb' in violation of the Fifth Amendment." *Id.* at 190, 79 S.Ct. at 668. The Court held that a prosecution by the federal government following on the heels of a state prosecution, was permissible based on the concept of dual sovereignty.

> We have here two sovereignties, deriving power from different sources, capable of dealing with the same territory . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and *may be punished by each*.

Id. at 194, 79 S.Ct. at 670, quoting *United States v. Lanza*, 260 U.S. 377, 382, 43 S.Ct. 141, 142, 67 L.Ed. 314 (1922) (emphasis added). Thus, it is clear that the government may include the Massaro homicide as an underlying crime in its R.I.C.O.* indictment based on the principle of dual sovereignty.

The defense contends, however, that the dual sovereignty theory does not apply here. They argue that the previous state Massaro prosecution was merely a cover for the federal authorities; that the federal authorities were so substantially involved in the state prosecution that they should not be allowed to relitigate the same issues here. Defendants also argue forcefully that since the two principal witnesses in the State court Massaro murder trial were under the Federal Witness Protection Program, that fact elevates the Massaro trial to the equivalent of a Federal prosecution.

I hold otherwise. While the cases note that "[t]he dual sovereignty doctrine is subject to the qualification * * * that a state prosecution cannot be used merely as a cover and a tool of federal authorities," *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir.1979), *cert. denied* 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 780 (1980), I have found no case where a court had prevented the federal government from proceeding with a prosecution notwithstanding their involvement in the preceding state court action. *See e.g., Bartkus v. Illinois*, 359 U.S. 121, 123-24, 79 S.Ct. 676, 678-79, 3 L.Ed.2d 684 (1959); *United*

*R.I.C.O. — Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1961 et seq.

States v. Liddy, 542 F.2d 76, 79 (D.C.Cir.1976). In *United States v. Liddy*, the D.C. Court of Appeals set forth the circumstances under which a federal prosecution, following a state prosecution, may be violative of the Double Jeopardy Clause of the Fifth Amendment. "*Bartkus*, as we view it, stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves." *Id.* at 79. In the instant case, the perjured testimony that was given in state court was an attempt to corroborate an informant's testimony, a step that would have been unnecessary in federal court. Moreover, it is clear that the Monroe County prosecution was not "begun at the *direction*," (*see United States v. Liddy* at pages 79-80), of the federal government but was rather initiated by the local authorities.

The defense makes a great deal out of the "co-mingling of manpower and prosecutorial efforts by the state and federal authorities in these prosecutions." But that factor was present — to some extent — in both *Bartkus* and in *Aleman*, and in both cases the respective courts praised the "cooperation between state and federal authorities [as] a welcome innovation." *United States v. Aleman*, at 309; *Bartkus v. Illinois*, 359 U.S. at 123, 79 S.Ct. at 678. I am in full agreement with those courts. The cooperation between state and federal police agencies and prosecutorial organizations is both laudatory and desired.

Historically, the merger of resources and investigative efforts by state and federal governments, was not always the case. The record of these proceedings show that in the original Massaro prosecution the state and federal governments were acting independently of one another. Ultimately the federal authorities withdrew from the case and the state continued alone. Clearly, based on the history of this case, the dual sovereignty theory should be applied and accordingly defendants' motion to dismiss the indictment based on the prior state Massaro convictions is denied.

THE 1976 R.I.C.O. INDICTMENT

On April 7, 1976, government prosecutors filed a two-count indictment charging defendant Piccarreto, defendant Marino and others with a R.I.C.O. substantive crime as well as a R.I.C.O. conspiracy. (18 U.S.C. § 1962(c), (d)). The 1976 indictment alleged that during that period from June 1, 1969, to August 31, 1973, Mr. Piccarreto and Mr. Marino were members of a criminal enterprise which conspired to commit and did commit multiple acts of arson and which devised a scheme to defraud certain insurance companies by means of false representations as to the facts and circumstances surrounding the fires. (For lack of a better descriptive name, the government refers to the 1976 R.I.C.O. indictment as the "arson for hire" indictment.) The "arson for hire" case was tried before a jury before the Honorable Harold P. Burke (now deceased) from September 13, 1977, to October 31, 1977, here in Rochester. On October 31, 1977, the jury rendered a verdict of not guilty as to both Mr. Piccarreto and Mr. Marino.

In the instant action, defendants Piccarreto and Marino argue that their acquittal in October, 1977, on the "arson for hire" charges bars prosecution of the present indictment. The defendants contend that their prosecution under the present indictment would violate the Double Jeopardy clause of the Fifth Amendment by "imposing more than one punishment for the same offense." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977).

The critical double jeopardy inquiry in the instant case is therefore whether these two R.I.C.O. indictments would, in effect, seek to punish the defendants twice for the same offense." The answer to this inquiry necessarily depends on what Congress envisioned as the "allowable unit of prosecution" when it enacted R.I.C.O. As the Supreme Court explained in *Sanabria v. United States*, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1977):

> It is congress and not the prosecution which establishes and defines offenses. Few, if any, limitations are imposed on the Double Jeopardy Clause on the legislative power to define offenses. But once Congress has defined a statutory offense by its prescription of the "allowable unit of prosecution," that *prescription determines the scope of protection afforded by a prior conviction or acquittal.* Whether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice.

Id. at 69-70, 98 S.Ct. at 2181-82 (citations omitted) (emphasis supplied). In the instant case the prosecution and defendants are in total disagreement as to their views of what constitutes an "allowable unit of prosecution." The government argues that Congress intended each "distinct pattern of racketeering activity" to be the allowable unit of prosecution. The defendants contend that the "allowable unit of prosecution" under R.I.C.O. is not the *acts* of racketeering but the *enterprise* itself. Under the government view, double jeopardy would not attach to a single criminal enterprise so long as successive R.I.C.O. indictments allege different patterns of racketeering activity. Under the defendants' view, once the government has obtained a R.I.C.O. conviction or acquittal as to a particular criminal enterprise, prosecutors may not indict the same enterprise again *for racketeering acts that occurred during the time period encompassed by the first R.I.C.O. indictment,* even if the second indictment alleges totally different racketeering activities.[1]

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[1]The position taken by the defendants during oral argument was significantly narrower than the position espoused in their motion papers. In the latter, the defendants' seemed to argue that once the government obtained a R.I.C.O. conviction or acquittal as to a particular criminal enterprise, prosecutors may *never* re-indict the same enterprise again under R.I.C.O. Under this view, in order for Mr. Marino or Mr. Piccarreto to be subject to another R.I.C.O. indictment, the government would have to "establish that a new and completely different enterprise than that prosecuted in the 1976 indictment existed", and that Mr. Marino and Mr. Piccarreto participated in the requisite number of racketeering acts committed by that "new" enterprise. (*See* Affidavit of Paul J. Cambria, Jr. ¶82. *See also* Memorandum of Law on Behalf of Mr. Piccarreto at ¶6; Memorandum of Law on Behalf of Mr. Russotti at ¶17.)

[2] In determining the "allowable unit of prosecution" under the R.I.C.O. statute, I am guided by the Supreme Court's recent language in *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)[2],

> *In order to secure a conviction under R.I.C.O. the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity'.* The enterprise is an entity, for present purposes, a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is on the other hand, a series of criminal acts as defined by the statute. 18 USC § 1961(1). *The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.* The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. *The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages.* The existence of an enterprise at all times remains a separate element, which must be proved by the Government" (452 U.S. at 583, 101 S.Ct. at 2528-29) (emphasis supplied).

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[2]The language of the R.I.C.O. statute itself is of little assistance in determining the "allowable unit of prosecution." As the Eighth Circuit noted in *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981), *modified en banc on other grounds*, 667 F.2d 729 (8th Cir. 1982), *cert. denied*, ___ U.S. ___, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982): "The statutory words [of R.I.C.O.] would support at least four [different] interpretations of the allowable unit of prosecution." *Id.* at 786.

It is apparent therefore that R.I.C.O. does not seek to criminalize membership alone in an enterprise[3]; nor does it criminalize racketeering activity standing alone.[4] Rather, it is the *combination* of these two separate and distinct elements which Congress intended to punish by enacting R.I.C.O.

[3] Accordingly, in order for the instant indictment to offend the Double Jeopardy Clause *both* the criminal enterprise and the pattern of racketeering alleged in the 1976 R.I.C.O. indictment must be "the same" as the criminal enterprise and the pattern of racketeering in the present indictment. If *both* are the same, the present indictment must be dismissed. If *either* is different, the indictment does not offend the Double Jeopardy Clause of the Fifth Amendment.

It is important to determine whether the 1976 R.I.C.O. indictment and the present indictment charge two distinct patterns of racketeering activity. In *United States v. Dean*, 674 F.2d 779 (8th Cir. 1981) the Court of Appeals for the Eighth Circuit adopted a five factor test in determining whether two R.I.C.O. counts presented "distinguishable instances of conduct or participation in the affairs of [an] enterprise." *Id.* at 786. The five factors utilized were:

1. The time of the various activities charged as part of separate patterns
2. The identity of the persons involved in the activities

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[3]*See United States v. Mandel*, 415 F.Supp. 997 (D.Md. 1976), where the Court states: "Indeed, the legislative history of [R.I.C.O.] . . . shows that Congress has taken pains to make a conviction dependent upon behavior and not 'status'. When faced with various proposals to incorporate a definition of organized crime, Congress flatly rejected the attempt, aware of the impossibility of definition." *Id.* at 1018. *See also United States v. Forsythe*, 560 F.2d 1127, 1136 (3rd Cir. 1977).

[4]*See United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 2965, 73 L.Ed.2d 1354.

3. The statutory offenses charged as racketeering activities in each charge

4. The nature and scope of the activity the Government seeks to punish under each charge

5. The places where the corrupt activity took place under each charge

[4] Accordingly this test is adopted and will be applied in the instant case.

1. *The time of the various activities charged as part of separate patterns:* The life of the enterprise in the 1976 R.I.C.O. case, ran from June 1, 1969, up to and including August 31, 1973. The life of the enterprise alleged in the present indictment runs from February 1, 1971, up to and including November 8, 1982. Thus, there does exist an overlap of approximately two and one-half (2½) years in the "lifespan" of the two enterprises. However, there is no overlap as to the predicate offenses alleged in the indictments. The last predicate offense in the 1976 indictment was alleged to have occurred on March 17, 1973. The first predicate offense in the present indictment is alleged to have occurred in October of 1973.

2. *The identity of the persons involved in the activities.* The 1976 indictment charged eight defendants, two of which were Richard Marino and Rene Piccarreto. The present indictment charges ten defendants, the only overlap being Mr. Piccarreto and Mr. Marino.

3. *The statutory offense charged as Racketeering Activities.* There appears to be minimal overlap in terms of the offenses charged as predicate racketeering crimes in the two indictments. The 1976 indictment charged arson and mail fraud. The present indictment charges murder, attempted murder, extortion and obstruction of justice. The only overlap under this factor is that both indictments allege arson as a predicate offense. However, the arson charged in the present indictment occurred five (5)

years after the acts alleged in the 1976 indictment concluded. In addition, the arson alleged in the present indictment is not part of the "arson for hire" scheme that was the focus of the 1976 indictment and trial.

4. *The nature and scope of the activity the government seeks to punish under each indictment.* The nature and scope of the activities the government seeks to prove under the present indictment is clearly different from the nature and scope of the activities alleged in the 1976 indictment. The 1976 R.I.C.O. indictment concerned alleged criminal acts committed for a single purpose: defrauding insurance companies by deliberately setting fires to insured buildings. The present indictment seeks to punish criminal activity wholly different from the "arson for hire" scheme alleged in the 1976 indictment. The nature and scope of the activity charged in the instant indictment concerns obtaining monies through the extortion of Rochester gambling clubs; protecting the affairs of the alleged criminal enterprise from "rival and competing individuals" through the use of threats, murder and arson; and avoiding law enforcement investigations of the criminal enterprise by committing illegal acts, including "threats involving murder and obstruction of justice." (Indictment NO. 82-156, filed November 9, 1982.) This Court fails to see any overlap in the nature and scope of the racketeering activity charged in the two indictments.

5. *The place where the corrupt activity took place under each indictment.* Both the 1976 and the present indictment allege events in and around the Rochester, New York area. However, as the government points out, "the location of the predicate acts of racketeering are wholly different, obviously because the crimes charged are different." (Government's Answer to Defendant's Motion to Dismiss, page 17).

[5] After careful application of the *Dean*, five factor test to the questioned indictments, I find that the 1976 R.I.C.O. in-

dictment and the present indictment reveal "distinct patterns of racketeering activity." *Dean, supra*, at 787. Accordingly, even assuming *arguendo* that the enterprises alleged in the two indictments are, in fact, the same (a determination I neither need to make nor do now make), prosecution of the defendants Marino and Piccarreto under the present indictment does not violate the Double Jeopardy Clause of the Fifth Amendment.

COLLATERAL ESTOPPEL AND THE 1976 R.I.C.O. ACQUITTAL

As an alternative argument, defendants Marino and Piccarreto assert that "even if the present prosecution is not totally barred by the Double Jeopardy Clause, at the very least, the government is prohibited from attempted to re-litigate issues resolved against them, and in favor of the defendants . . . during the 1977 trial." (Affidavit of Paul J. Cambria, Jr. ¶84.

Both the government and the defendants agree that the correct principle of law to be utilized in determining the collateral estoppel issue is found in the Supreme Court's decision in *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In *Ashe*, the Court held that the doctrine of collateral estoppel, as applied to criminal proceedings, precluded the government from relitigating an issue of ultimate fact that was *necessarily* determined in favor of a defendant by a valid and final judgment in a prior proceeding involving the same parties. *Ashe, supra*, at 444, 90 S.Ct., at 1194. *See also United States v. Tramunti*, 500 F.2d 1334, 1346 (2nd Cir. 1974) *cert. denied*, 419 U.S. 1079, 95 S.Ct. 667, 42 L.Ed.2d 673 (1974). The Court's task is to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe, supra*, at 444, 90 S.Ct., at 1194. In this regard, the burden is on "the defendant to establish that the issue he seeks to foreclose from litigation in the present prosecution was

necessarily decided in his favor by the prior verdict." *United States v. Cala*, 521 F.2d 605, 608 (2nd Cir. 1975). *See also United States v. Boffa*, 513 F.Supp. 444 (D.Del. 1980) *aff'd in part and rev'd. in part on other grounds*, 668 F.2d 919 (3rd Cir. 1982).

[6] The issue of fact which defendants Marino and Piccarreto believe was necessarily determined in their favor as a result of their 1977 acquittal of R.I.C.O. charges is that they were not members of the criminal enterprise charged in the 1976 indictment. Even assuming, for the sake of argument, that the criminal enterprise alleged in the 1976 R.I.C.O. indictment is the *same* criminal enterprise alleged in the present indictment, defendants' collateral estoppel arguments must, nonetheless be rejected. Certainly, there exist other plausible explanations for the jury's acquittal of Marino and Piccarreto in 1977 other than a determination that neither was a member of the criminal enterprise.

In *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), the Supreme Court made clear that there exist two distinct elements necessary for a R.I.C.O. conviction: (1) the existence of an enterprise and (2) the requisite number of racketeering acts committed by participants in the enterprise. *Id.* at 583, 101 S.Ct. at 2528. Mr. Marino's and Mr. Piccarreto's acquittal in 1977 could rationally have been based upon the jury's determination that, while they were both *members* of the enterprise, they did not participate in the particular affairs of the enterprise charged in the 1976 indictment (which was the arson for hire and insurance company fraud scheme).

Therefore, the defendants have failed to carry their burden for demonstrating that their prior 1976 R.I.C.O. acquittal "necessarily" resolved any issue in the present indictment against the government. Accordingly, their motion to dismiss portions of the indictment on collateral estoppel grounds is denied.

PROSECUTORIAL VINDICTIVENESS OR MISCONDUCT

[7, 8] Defendants have also moved to dismiss the present indictment on the grounds of Prosecutorial vindictiveness or misconduct. The defendants have the burden of demonstrating vindictiveness sufficient to require dismissal of the indictment. *See United States v. Goodwin*, ___ U.S. ___, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982); *United States v. Gallegos-Curiel*, 681 F.2d 1164 (9th Cir. 1982). After careful consideration of the pleadings, affidavits, exhibits and other legal memorandum submitted by the parties, I find that the defendants' conclusory allegation of prosecutorial misconduct does not satisfy that burden. Accordingly, their motion to dismiss the indictment of prosecutorial vindictiveness grounds is denied.

In sum, the defendants' motion for a dismissal of the indictment or portions thereof on Double Jeopardy, Collateral Estoppel or prosecutorial vindictiveness grounds is, in all respects, denied.

ALL OF THE ABOVE IS SO ORDERED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

U. S. A.

vs.

SAMUEL J. RUSSOTTI, RENE PICCARRETO, RICHARD J. MARINO & THOMAS E. MARROTTA

Cr. 82-156
C/A 83-1054
83-1055
83-1056
83-1069

A certified copy of the mandate of the United States Court of Appeals for the Second Circuit dated August 29, 1983, having been filed in the office of the Clerk of this court on September 23, 1983, it is hereby

ORDERED, ADJUDGED AND DECREED that said mandate be, and hereby is, made the judgment of this court.

JOHN T. CURTIN
Chief United States District Judge

Dated: September 23, 1983
Buffalo, New York

18 U.S.C. §§ 1961 and 1962

§ 1961. Definitions

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving [bankruptcy] fraud . . . , fraud in the sale of securities, or the

felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962 Probited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the

securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

Nos. 83-696 and 83-713

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD J. MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

RENE PICCARRETO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the Double Jeopardy Clause, petitioners' prior acquittals on RICO charges foreclosed the government from alleging one of the predicate acts of racketeering charged in the instant RICO indictment.

2. Whether the government is collaterally estopped by petitioners Marino's prior acquittals from proving that, from 1971 to 1973, Marino participated in the enterprise charged in the present indictment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17)[1] is reported at 717 F.2d 27. The opinion of the district court (Pet. App. A19-A34) is reported at 555 F. Supp. 1236.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1983. The petitions for a writ of certiorari were filed on October 27, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." refers to the appendix to the petition in No. 83-696.

STATEMENT

1. In an indictment filed in the United States District Court for the Western District of New York on November 8, 1982, petitioners and eight others were charged with participating in an enterprise through a pattern of racketeering activity, in violation of the RICO statute, 18 U.S.C. 1962(c), and with conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d). The indictment alleged that petitioners and their co-defendants engaged in a scheme to extort money from Rochester, New York, gambling clubs, to use threats, murder and arson against their competitors, and to avoid detection by committing other illegal acts, including murder and obstruction of justice. The pattern of racketeering activity was alleged to have occurred from October 1973 to December 17, 1981. The life of the enterprise was alleged to have run from February 1, 1971, until the date of the indictment.

Five years earlier, in October 1977, petitioners were acquitted of violating 18 U.S.C. 1962(c) and (d) under another indictment filed in 1976. That indictment alleged that petitioners and six others — none of whom was also charged in the 1982 indictment — had engaged in a scheme to commit arson and to defraud insurance companies by means of false representations as to the facts and circumstances surrounding the fires. The pattern of racketeering activity was alleged to have occurred from January 26, 1970, to March 17, 1973. The life of the enterprise allegedly ran from June 1, 1969, to August 31, 1973.

2. Petitioners moved to dismiss the instant indictment. They claimed, inter alia, that the government is seeking to punish them for the same offenses of which they previously were acquitted, in violation of the Double Jeopardy Clause. They also contended that the government is collaterally estopped from litigating the issue whether they were

members of the alleged enterprise because that issue necessarily was decided in their favor as a result of their prior acquittals. The district court denied the motions (Pet. App. A19-A34).

On petitioners' interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), the court of appeals affirmed (Pet. App. A1-A17). With respect to petitioners' double jeopardy claim, the court held that, "in order for the present indictment to give rise to a valid claim of double jeopardy, *both* the enterprise and the pattern of activity alleged in the 1976 indictment must be the same as those alleged in the 1982 indictment" (*id.* at A12) (emphasis in original). The court went on to determine (*id.* at A14) that, even assuming the two indictments charged the identical enterprise, the patterns of racketeering activity were clearly distinct. In particular, the court considered it significant that the 1976 indictment concerned a scheme to defraud insurance companies by deliberately setting fires to insured buildings and collecting the insurance proceeds, whereas the present indictment is directed at a scheme whose primary objective was to extort money from gambling clubs (*id.* at A13).

The court of appeals rejected petitioners' contention that the government was barred from charging one of the racketeering acts alleged in the 1982 indictment — the 1973 murder of Jimmy Massaro — because it could have been charged in the 1976 indictment (Pet. App. A15). The court concluded that "the 1982 indictment includes the Massaro murder as one of several unlawful acts designed to maintain control over the enterprise's membership in furtherance of its *extortion scheme* — a scheme which had no relationship to the 1976 arson-for-hire activity" (*ibid.*) (emphasis in original).

Finally, the court of appeals rejected petitioners' claim that the government was collaterally estopped by the earlier acquittals from proving that petitioners were members of the alleged enterprise. First, the court concluded that the two enterprises were "wholly different" (Pet. App. A16). Beyond that, the court determined that, even assuming that the enterprises in each indictment were the same, "[t]he acquittal of [petitioners] * * * could have been the result of a jury determination that while they were members of the enterprise, they did not participate in the arson-for-hire or insurance fraud schemes" (*id.* at A17).

ARGUMENT

1. Petitioners apparently no longer take the position that the present indictment is completely barred by their earlier acquittals. Instead, they argue (83-696 Pet. 4-10; 83-713 Pet. 5-11) that the inclusion in the indictment of the 1973 Massaro homicide as a predicate act of racketeering is barred on double jeopardy grounds because it could have been charged as a predicate act in the 1976 indictment. Their argument rests on the premise that the two indictments involved a single enterprise having diverse criminal objectives. As we show below, however, the Massaro homicide in fact bore no relation to the enterprise charged in the 1976 indictment — which was separate and distinct from the enterprise alleged in the instant indictment — and therefore could *not* have been charged there as a predicate act of racketeering.

The court of appeals correctly found (Pet. App. A16) that the present indictment and the 1976 indictment charged "wholly different" enterprises. The term "enterprise," as used in 18 U.S.C. 1961(4), denotes an organizational unit consisting of a group of individuals that is defined by reference to the common purpose or objective for which they have joined together. See *United States* v. *Turkette*, 452 U.S. 576, 583 (1981). Here, the alleged enterprises had

clearly distinct objectives; the objective of the enterprise charged in the instant indictment was to extort money from gambling clubs, whereas the objective of the enterprise charged in the earlier indictment was to commit arson and insurance fraud.[2] Moreover, the membership of the two enterprises was significantly different; of the 18 persons indicted in 1976 and 1982, only the two petitioners were named in both indictments. And, with the exception of a single act of arson alleged as a predicate act in the 1982 indictment (committed five years after the last arson charged in the 1976 indictment and for the purpose of advancing the extortion rather than the insurance fraud scheme), the two enterprises engaged in altogether different acts of racketeering. Although the lives of the enterprises did overlap for about two and one-half years, the evidence clearly supports the court of appeals' determination that the enterprises constituted two separate entities.

It is the government's theory in this case that Massaro was murdered because he had breached the rules of the enterprise by engaging in bookmaking activities not sanctioned by the enterprise. The murder thus related solely to the extortion scheme that was the objective of the enterprise charged in the presently pending indictment, and was entirely unconnected to the enterprise charged in the 1976 indictment and its arson and insurance fraud scheme. Hence, contrary to petitioners' claim, there was no basis for charging the Massaro murder as a predicate act in the 1976 indictment.

In support of their argument that the two indictments involved a single enterprise, petitioners attempt to draw an analogy to non-RICO conspiracy cases, such as *United*

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[2]The enterprise alleged in the 1976 indictment was defined as "[a] group of individuals associated in fact to commit arson and to defraud certain insurance companies" (C.A. App. 30, 37).

States v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975), and *Short* v. *United States*, 91 F.2d 614, 624 (4th Cir. 1937), which hold that the government may not make multiple indictments out of a single conspiracy by alleging different overt acts. However, in *Mallah* and *Short* the object of the conspiracies charged in successive indictments was the same: to traffic in narcotics in *Mallah* and to unlawfully distill, conceal, and remove spiritous liquors in *Short*. Thus, in those cases the overt acts charged in the second indictment clearly could have been charged in the first without changing the nature of the conspiracy. Here, by contrast, the two alleged enterprises encompassed wholly different objectives and the Massaro murder could not, consistent with the objective of the earlier enterprise, have been charged as a predicate act of racketeering in the 1976 indictment. See *United States* v. *Bagaric*, 706 F.2d 42, 55 (2d Cir. 1983) ("the nature of the misconduct often provides the best clue toward defining the enterprise").

Nor are petitioners aided by *Sanabria* v. *United States*, 437 U.S. 54 (1978), upon which they also rely. In that case Sanabria and others were charged with conducting an illegal gambling business, in violation of 18 U.S.C. 1955. The indictment alleged that the illegal gambling business involved numbers betting and betting on horse races in violation of Massachusetts law. After the defense rested, the trial court granted a defense motion to exclude all evidence of numbers betting and then granted a motion to acquit Sanabria because of lack of evidence of his connection with horse betting. This Court held that the exclusion of the numbers betting evidence had been erroneous, but concluded that the government could not retry Sanabria on the numbers portion of the indictment. The Court explained that the indictment charged only a single gambling business and that the discrete violations of state law that the business

may have committed were not severable in order to avoid the Double Jeopardy Clause's bar against retrials for the same offense. 437 U.S. at 69-74. But here, the government did not charge petitioners' extortion activities as part of the 1976 indictment, nor has it ever contended that the arson and insurance fraud activities alleged in the 1976 indictment and the extortion activities alleged in the present indictment were committed in furtherance of the same enterprise. Accordingly, *Sanabria* provides no basis for excluding the Massaro murder from the present indictment on double jeopardy grounds.

Finally, petitioners rely on several cases holding that a single RICO enterprise may encompass numerous diverse and unrelated criminal objectives. See, *e.g., United States* v. *Weisman*, 624 F.2d 1118 (2d Cir.), cert. denied, 449 U.S. 871 (1980); *United States* v. *Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). Petitioners' point seems to be that the government could have defined the enterprise charged in the 1976 indictment in such a way as to permit the inclusion of the Massaro murder as a predicate act of racketeering. However that may be, nothing in any of the RICO cases cited by petitioners remotely suggests that, by failing to do so, the government precluded itself from alleging the Massaro murder as a predicate act in a subsequent RICO prosecution against them involving a criminal scheme wholly distinct from that charged in the 1976 indictment.

Clearly, there is no reason to believe, as petitioners suggest, that the government deliberately "carved up" a single RICO enterprise in the 1976 indictment in order to facilitate future RICO prosecutions against petitioners. The 1976 and 1982 indictments were separated by six years and, if petitioners had not been thought to have participated in extortion activities in the interim, the second RICO prosecution would never have been brought. Moreover, at the time of the 1976 indictment, *Weisman*, *Elliott*, and the other

RICO cases cited by petitioners had not yet been decided, and it was altogether unclear whether a single RICO enterprise could encompass diverse and unrelated criminal objectives. See *United States* v. *Ingman*, 541 F.2d 1329 (9th Cir. 1976) (decision to indict for separate conspiracies not made in bad faith or intended to harass). In short, petitioners' double jeopardy claim must fail.

2. Petitioner Marino also contends (Pet. 11-12) that the government is collaterally estopped by his 1976 acquittals from proving that he participated in the enterprise charged in the present indictment from 1971 to 1973.

In *Ashe* v. *Swenson*, 397 U.S. 436, 444 (1970), this Court held that the doctrine of collateral estoppel precludes the government from relitigating an issue of ultimate fact involving the same parties that was *necessarily* determined in favor of the defendant in an earlier prosecution. Here, petitioner Marino asserts that his acquittal on the 1976 RICO charges necessarily meant that the jury concluded that he was not a member of the enterprise charged in that indictment. Based on the premise that the enterprises charged in the two indictments were the same, he argues that the government is precluded from relitigating his membership in the enterprise from 1971 to 1973, the period during which the lives of the two enterprises overlapped.

In the first place, as we already have shown and as the court of appeals concluded (Pet. App. A16), the two enterprises were not the same. Accordingly, even if the jury's acquittal of petitioner Marino in 1977 necessarily amounted to a finding that he was not a member of the enterprise charged in that case, the government would not be estopped in any way from proving that he participated in the enterprise charged here.

In any event, the 1977 acquittal did not necessarily amount to such a finding. Marino's acquittal could plausibly have been the result of a jury determination that, while Marino was a member of the enterprise, he did not participate in or agree to participate in any of the acts of racketeering enumerated in the indictment.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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